

Another View of Expediting the Large, Complex Case: A Response to Arbitrator Gorske from Counsel for the Defense

REUBEN L. HEDLUND
DEBORAH C. PASKIN*

I. INTRODUCTION

Efficient management of a large, complex case, such as the one previously described in this journal by Robert H. Gorske,¹ has been a challenge to jurists since big case litigation became commonplace in the federal courts following World War II. The difficulties encountered in attempting to process protracted litigation expeditiously, while simultaneously protecting the rights of the parties and avoiding reversible error, are exacerbated by the fact that all of this takes place within an adversarial system of justice. As Mr. Gorske correctly observes, "In the large, complex case the parties are typically represented by competent, even extraordinary counsel."² And that competent counsel can be depended upon to litigate aggressively and creatively every step of the way, including those steps leading to the Supreme Court. With so much at stake in the typical big case, the parties' and lawyers' resources are usually more than sufficient to meet the opportunity or challenge.

Mr. Gorske poses the correct and intriguing question: how would, or should, large complex cases fare in arbitration? With respect to the case that he describes, and in which we represented the defendant contractor, the answer is best made by noting that when it was over, \$800 million in claims had been adjudicated, in a process involving 126 days of hearings, 62 witnesses, 30,000 pages of transcript and 36 file boxes of exhibits. The fact that the "losing" party failed to persuade the reviewing federal court that *any* error had been committed in the handling of the case, and no appeal of the

* Reuben L. Hedlund, B.A., University of Chicago and Denison University, 1956; LL.B., Yale University, 1959; is a partner in the Chicago office of Latham & Watkins, and a Fellow of the American College of Trial Lawyers. Deborah Corthier Paskin, B.A., Indiana University, 1974; M.A., Rosary College, 1975; J.D., Northwestern University, 1983; corporate counsel, Helene Curtis, Inc. was an associate in the Chicago office of Latham & Watkins, and former law clerk to Judge Grady of the Northern District of Illinois. The authors would like to thank the other members of the "A Team," Job Taylor, Kevin Russell, Thomas Pooley, D.R. Edwards, Harry Downs, Corbett Hankey, Brady Carter and Barbara Pipchok, for their assistance, advice, support and, throughout 126 days of hearings, their unfailing sense of humor. The authors also wish to acknowledge the assistance of James W. Baker, a third-year law student at the University of Chicago and a Latham & Watkins summer associate, in the final preparation of this article.

1. Gorske, *An Arbitrator Looks at Expediting the Large, Complex Case*, 5 OHIO ST. J. ON DIS. RES. 381 (1990).

2. *Id.* at 398.

merits was taken thereafter, is testament to the care with which Chairman Gorske and the panel of arbitrators conducted the proceedings.³

Merely steering a "bet the company" arbitration through seas uncharted by procedural rules adequate to the task, required Herculean effort; Mr. Gorske is far too modest in his observation that "the procedure generally worked in the manner intended."⁴ Notwithstanding the panel's daring in fully articulating their decision on the merits, and in denying ninety-seven percent of the total of damages sought by the opposing owner of the project, the arbitration award proved, in the end, appeal-proof and final. Resolving a dispute of this magnitude in two and one-half years, as this panel did, would have tested the acumen of the best of trial jurists.

We would take issue, however, with Mr. Gorske's conclusion that the case "would have gone on much longer in the full course of court litigation."⁵ Even if our assessment of this issue is the correct one, it takes nothing from the panel's personal achievements in their handling of the case; after all, they had neither the authority of fully interpreted Federal Rules of Civil Procedure to back them up, nor the judicially authored "Manual for Complex Litigation"⁶ to guide them along the way. Rather, they had as their compass only the American Arbitration Association's (AAA) "Commercial Arbitration Rules" and the AAA's "Guidelines for Expediting Large, Complex Commercial Arbitrations," both of which are enormously inadequate to the job of efficiently managing a vigorously contested, complex and protracted arbitration. Indeed, were it not for the experience, conscientiousness and, yes, plain courage of the panel, the parties might still be at it, or, worse yet, the case could have been remanded for further hearings until either the resolve or resources of at least one of the parties had been exhausted.

Hidden in the footnotes of Mr. Gorske's article (and in his modesty) is a strong clue as to why the case fared no worse than it would have in a court resolution of the dispute. In notes 14, 20 and 22,⁷ Gorske makes reference

3. On August 4, 1989, in an unreported opinion, the United States District Court for the Middle District of Louisiana, Judge Polozola, confirmed the arbitration award in all respects and entered judgment upon it. Although the award itself was not appealed, the Fifth Circuit confirmed another aspect of the case in *Cajun Elec. Power Coop. v. Riley Stoker Corp.*, 901 F.2d 441 (5th Cir. 1990). The court had previously affirmed Judge Polozola's order requiring the parties to arbitrate in *In re Cajun Elec. Power Coop.*, 791 F.2d 353 (5th Cir. 1986).

4. Gorske, *supra* note 1, at 390.

5. *Id.*

6. *MANUAL FOR COMPLEX LITIGATION*, § 10 (2d ed. 1985). The Manual was specifically developed "as a result of the efforts of judges and lawyers to improve existing practices and their willingness to innovate with the challenge of difficult problems." *Id.*, introduction at 1.

7. Gorske, *supra* note 1, at 392, 396, 397.

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to the "Rules for the Non-Administered Arbitration of Business Disputes," issued, together with useful "Commentary" written in mid-1989, by the Center for Public Resources ("CPR Rules").⁸ The CPR Rules are a long-overdue and ground-breaking approach to accommodating the large, complex dispute to the arbitration process, even though they do not yet conquer that elusive objective.

Although we did not realize it at the time, a number of the CPR Rules were first flight-tested in the very arbitration described by Mr. Gorske. In hindsight, this was unsurprising, in light of the fact that Mr. Gorske was one of the principal architects of the CPR Rules and Commentary.⁹ Also, in hindsight, it is clear that a number of procedures, adopted by the Gorske panel only near the end of our proceedings, would have greatly expedited resolution of the dispute and decreased its cost, had they been in place at the outset. These procedures are now part of the CPR Rules and are discussed below. On the other hand, the largest obstacle to expeditious and efficient arbitration of large, complex cases was not addressed in our case, is not *adequately* dealt with in Mr. Gorske's reflections in his Article, and, more unfortunately, is only timidly confronted in the new CPR Rules. That obstacle, which we also discuss below, is the old bugaboo of speedy civil justice -- adversarial discovery.¹⁰

II. PREHEARING PROCEDURES

Part C of the CPR Rules contains those rules most important to efficient management of the large, complex arbitration. This section begins with the largest grant of authority to arbitrators ever bestowed by an initiating body. Thus, Rule 9.1 commences with the mandate that: "Subject to the Rules, the Tribunal may conduct the arbitration in such manner as it shall deem appropriate."¹¹ In case the casual reader of this Rule misses the point, the accom-

8. Copies of the RULES FOR THE NON-ADMINISTERED ARBITRATION OF BUSINESS DISPUTES (Center for Public Resources 1989) [hereinafter ARBITRATION OF BUSINESS DISPUTES] may be obtained from the Center for Public Resources, Inc., 366 Madison Ave., New York, NY 10017. The CPR Rules were developed by a committee of leading arbitrators and practitioners "to facilitate the conduct of arbitration fairly, expeditiously and economically." *Id.* CPR Commentary at 2.

9. Mr. Gorske is a member of the CPR Committee on Private Adjudication.

10. An excellent analysis of this subject may be found in Wolfson, *Addressing the Adversarial Dilemma of Civil Discovery*, 36 CLEV. ST. L. REV. 17 (1988). Wolfson concludes that adversarial discovery as it is currently practiced frustrates the stated goals of the Federal Rules of Civil Procedure, *i.e.*, "to serve the just, speedy, and inexpensive determination of every action." *Id.* at 66. See also Schwarzer, *The Federal Rules, The Adversary Process, and Discovery Reform*, 50 U. PITT. L. REV. 703 (1989).

11. ARBITRATION OF BUSINESS DISPUTES, *supra* note 8, at Rule 9.1.

panying Commentary spells out exactly what the promulgators of the CPR Rules had in mind:

The efficiency of the proceeding will depend in large part on the chairman's taking the lead in asserting the Tribunal's control over critical aspects of the procedure, including the setting of time limits as authorized by Rule 9.2. The Rules give the Tribunal wide latitude as to the manner in which the proceeding will be conducted. It is expected that the procedure will be determined in large part during the pre-hearing conference(s) held pursuant to Rule 9.4 and that following the conference(s) the Tribunal will issue one or more orders on procedural matters.¹²

With this one sentence at the beginning of Rule 9, and in one fell swoop, the CPR drafting committee eliminated from the arbitration process, one of the cornerstones of the adversary system of justice: the neutral and passive fact-finder.¹³ In doing so, the Rules have made a major contribution to establishing arbitration as a truly *alternative* method of complex dispute resolution, rather than just another, not necessarily better, method for handling the big case.

The arbitrators' grant of authority in Rule 9.1 first comes into play, under the CPR Rules, at the prehearing conference provided by Rule 9.4. While Rule 9.4 suggests (though it should *require*) a number of useful procedures, the principal success of the prehearing conference in the case described by Mr. Gorske was the issuance of an order requiring each party to file a detailed Statement of Position, comparable to a pretrial brief.¹⁴ These pre-

12. *Id.*, Rule 9 at 12.

13. For a detailed discussion of the origin, function and importance of this key element to adversary systems, see Landsman, *A Brief Survey of the Development of the Adversary System*, 44 OHIO ST. L.J. 713, 714-15, 730-32 (1983) (this article was part of a larger study for the American Enterprise Institute, S. Landsman, *The Adversary System: A Description and Defense* (American Enterprise Institute 1984)).

There is an ongoing debate about the extent to which judges should depart from their traditionally passive role. See Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982) (generally opposes "managerial judging" because of its tendency to increase the power of judges and because it threatens impartiality and important due process rights); Miller, *The Adversary System: Dinosaur or Phoenix*, 69 MINN. L. REV. 1, 19-22 (1984) (supports increased judicial management as a means for decreasing delay and preventing lawyer abuse); Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985) (discusses the advantages of the German system of civil procedure in which the judge acts as the gatherer of evidence and exercises much more control over the direction of a case than does an American judge).

14. See ARBITRATION OF BUSINESS DISPUTES, *supra* note 8, at Rule 11.1, which provides that:

The Tribunal shall determine the manner in which the parties shall present their cases. Unless otherwise determined by the Tribunal, the presentation of a party's case shall include the submission of a pre-hearing memorandum including the following elements:

(a) A statement of facts;

(continued...)

hearing memoranda contributed materially to the effective administration of the case. By providing the arbitrators with the factual and legal background for the parties' claims, a basis was created for the panel to decide upon the playing field and implement certain ground rules as the case progressed.

Mr. Gorske's suggestion that overall administration of the case could have been improved, had the prehearing memoranda been filed *in advance* of the conference, is a good one. Access to the parties' Statements of Positions, *prior* to the prehearing conference or to a subsequent one, would have provided the arbitrators with a much fuller understanding of each party's view of the legal and factual issues underlying the dispute; accordingly, this would have permitted the fashioning, at the outset, of more detailed and reliable guidelines and rules for the conduct of the proceedings. In a complex arbitration, the desirability of scheduling several prehearing conferences, prior to the commencement of evidentiary hearings, is obvious and is suggested at the end of CPR Rule 9.4.¹⁵

It would also have been helpful if both parties had been required to submit, prior to a final prehearing conference, an initial list of witnesses expected to be called during each party's case-in-chief, together with time estimates for the direct presentation of that testimony.¹⁶ Each party should also have been required to set forth proposed procedural approaches for the efficient and effective administration of the case, together with a description of the nature and extent of discovery each party needed, if any. If this had been done, the parties and the arbitrators would have had the advantage of considering the respective submissions and proposals; and this should have led to a more productive discussion of the procedural and discovery issues at the prehearing conference itself. In this way, the panel could have (1) more accurately determined the long-term schedule for the case, (2) designated the most logical locale for hearings, according to the collective convenience of

14. (...continued)

- (b) A statement of each claim being asserted;
- (c) A statement of the applicable law upon which the party relies;
- (d) A statement of the relief requested, including the basis for any damages claimed; and
- (e) A statement of the evidence to be presented, including the name, capacity and subject of testimony of any witnesses to be called and an estimate of the amount of time required for the witness' direct testimony.

See also *id.* at Rules 9.4(a) and 9.5.

15. *Id.*, at Rule 9.4 provides, in relevant part, that "[a]fter the initial conference, further prehearing or other conferences may be held as the Tribunal deems appropriate."

16. See *id.* at Rule 11.1(e).

witnesses, the parties and the panel,¹⁷ and (3) established a more expeditious order and manner of proof.¹⁸

III. PROCEDURES RELATING TO THE PRESENTATION OF EVIDENCE

Many of the procedures implemented by the panel relating to the presentation of testimony and other evidence worked very well. These procedures included the prefiling of written testimony and exhibits,¹⁹ the direct filing of such testimony with the panel members, self-authentication of exhibits and, belatedly, time limits on the presentation, as well as cross-examination of certain testimony.²⁰ All of these procedures avoided some of the more formalistic and/or ritualistic trappings of traditional litigation, and therefore significantly shortened the hearing time.

However, there were a number of procedures that could have been implemented, or implemented earlier, which would have saved even more hearing time. While in the later stages of the case the panel *did* impose time limits on the presentation and ordering of evidence, and its cross-examination, these controls would have been far more effective had they been implemented much earlier in the proceedings.²¹ In addition to general time limits, the

17. See *id.* at Rule 9.6.

18. See *id.* at Rule 11.1: "The Tribunal shall determine the manner in which the parties shall present their cases." This implicitly includes "the mode, manner and order for presenting proofs," see Rule 9.4(a), and explicitly, "the manner in which witnesses are to be examined," see *id.* at Rule 11.4.

19. See *id.* at Rule 11.2, which provides in part that "[e]vidence may be presented in written or oral form as the Tribunal may deem appropriate."

20. See *id.* at Rule 9.2, which provides that:

The hearings shall be conducted in an expeditious manner. The Tribunal is empowered to impose time limits it considers reasonable on each phase of the proceeding, including without limitation the time allotted to each party for presentation of its case and for rebuttal.

21. For example, we suggested at the prehearing conference, that each party put on its case-in-chief without interruption, to be followed by cross-examination of these respective sections of the case. Although this procedure was not followed initially, it was implemented and adopted for the presentation and cross-examination of the parties' respective rebuttal cases. This separation of direct and cross-examination not only greatly increased the coherence of the presentation of evidence, but significantly reduced the amount of time taken up by cross-examination.

The complete denial of cross-examination in a civil case would probably amount to a denial of due process. See *In re Oliver*, 333 U.S. 257, 273 (1948) (in a criminal case the right to examine adverse witnesses is a due process right), but merely separating direct from cross-examination in an arbitration hearing would not violate any constitutional rights. Cf. *Papapetropoulos v. Milwaukee Transport Serv.*, 795 F.2d 591 (7th Cir. 1986) (denial of full cross-examination in employment termination arbitration hearing is not a denial of due process);

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panel early on should have refused to permit "live" testimony, where cross-examination had been waived, based on pre-filed testimony, or multiple appearances of the same witness.²² Not only would such procedures have shortened the hearing time, they also would have forced the parties to make more productive use of that time. Any such limits would, of course, have been subject to modification had the circumstances warranted.²³

Finally, a more active role could have been assumed by the panel in the examination of witnesses.²⁴ This would have helped focus the presentation of evidence, and its cross-examination, on the areas of real interest to the arbitrators. We suspect this was not done by our panel, out of fear that one party might subsequently argue that the panel's questions indicated pre-judgment of issues and, hence, deprivation of a fair hearing. It bears noting,

21. (...continued)

Benjamin v. Traffic Exec. Ass'n Eastern R.R.s., 869 F.2d 102 (2d Cir. 1989) (court upholds arbitration decision even though cross-examination was restricted).

The effectiveness and usefulness of cross-examination has been criticized. *See* Langbein, *supra* note 13, at 834 n.31 ("In the hands of many of its practitioners, cross-examination is not only frequently truth-defeating or ineffectual, it is also tedious, repetitive, time-wasting, and insulting.")

22. *See* ARBITRATION OF BUSINESS DISPUTES, *supra* note 8, at Rules 11.2 and 11.4.

23. In his reply to this article, Gorske, *A Reply*, 6 OHIO ST. J. ON DIS. RES. 77 (1990), [hereinafter *Gorske's Reply*], Mr. Gorske acknowledges that, "The Arbitrators simply had no way of reliably determining what restraints could reasonably be imposed without *improperly* impeding the fair presentation of . . . evidence." *Id.* at 79 (emphasis supplied). This confirms our belief that the real reason behind the arbitrators' failure firmly to control the proceeding was the panel's fear of committing reversible error. However, given the deference accorded arbitration decisions and the extremely limited grounds for review, *see supra* note 21 and *infra* note 34, we believe that such fears were unfounded and, in any event, prolonged the proceedings and increased their expense.

24. FED. R. EVID. 614 permits federal judges in their discretion to both call and question witnesses, although the power is not often exercised. J. WEINSTEIN & M. BERGER, 3 WEINSTEIN'S EVIDENCE ¶ 614[01] (1990) [hereinafter WEINSTEIN'S EVIDENCE] (quoting Judge Learned Hand: "A judge is more than a moderator; he is charged to see that the law is properly administered, and it is a duty which he cannot discharge by remaining inert."). The advisory committee's notes to Rule 614 indicate that judicial questioning of witnesses more often occurs in criminal trials than in civil cases. The committee's notes also state that the authority to question witnesses is abused, "when the judge abandons his proper role and assumes that of advocate" However, reversals for improper questioning are rare. *Id.* at ¶ 614[03] n.8.

In comparison to the U.S. system, judges serve as the "examiner-in-chief" in the German system of civil procedure with the lawyers for the parties asking questions only after the judge has completed his examination. *See* Langbein, *supra* note 13, at 828.

however, that judges frequently display the same reluctance, in adherence to their role as "neutral and passive fact-finders."²⁵

IV. CPR SETTLEMENT AND DECISION PROCEDURES

Gorske notes that at one point in the proceedings, and with the consent of the parties, the panel proposed a format for settlement discussions, along the lines of a mini-trial and away from the hearing and knowledge of the arbitrators.²⁶ This suggestion, though complied with by the parties, and now embodied in CPR Rules 9.4(d) and 17, bore no fruit. This was because of two principal reasons unrelated to the intransigence of either or both parties: first, the contractual obligation to arbitrate is itself an acknowledgement by the parties, in advance of disputes arising out of the contract, that it makes more sense to settle than to litigate. Once arbitration proceedings actually get underway, however, the parties have decided, in effect, that they cannot settle the dispute *by themselves*, but need knowledgeable, objective and outside help to do it for them.²⁷ Parties to arbitration agreements rarely need to be reminded of the benefits of settlement.

Second, and most importantly, arbitrators usually confine their role to "passive" fact-finders,²⁸ as did Chairman Gorske and his panel until near the

25. As Professor Landsman argues:

Adversary theory further suggests that neutrality and passivity are essential not only to ensure an evenhanded consideration of each case, but also to convince society that the judicial system is trustworthy; when a decision-maker becomes an active questioner or otherwise participates in a case, society is likely to perceive him as partisan rather than neutral. Judicial passivity thus helps to ensure the appearance of fairness.

Landsman, *supra* note 13, at 715.

26. Gorske, *supra* note 1, at 389.

27. Recently, one of our clients was sued by its joint venture partner in defiance of an arbitration clause, accompanied by demands for immediate and large-scale discovery. Upon receipt of our motion to compel arbitration, the litigious partner promptly agreed to negotiations, obviously preferring to settle without outside intervention and on terms it could control. In this case, the mere threat of arbitration led to the parties' decision to settle their differences on their own.

However, despite anecdotal evidence to the contrary, *see* WILKINSON, DONOVAN, LEISURE, NEWTON & IRVIN ADR PRACTICE BOOK 13 (1990), arbitration does not necessarily lead to faster disposition of cases than does traditional settlement discussions in the context of litigation. In a recent Rand Corporation study of court-annexed arbitration in a North Carolina federal court, the cases assigned to arbitration were concluded in an average of 285 days as compared to 282 days for nonarbitrated cases. Wall St. J., Sept. 5, 1990, at B10, col. 2.

28. As Professor Landsman further states, "[A]dversary theory suggests that if the decision-maker strays from the passive role he risks prematurely committing himself to one version of the facts and failing to appreciate the value of all the evidence." *See* Landsman, *supra* note 13, (continued...)

close of the proceeding.²⁹ Traditionally, arbitrators will refrain from interim, dispositive rulings, comments or requests for evidentiary or legal support found wanting in one or both parties' claims. Without these signals along the way, which commonly occur in judicial proceedings, both parties may remain deeply in the dark surrounding the realities of their chances for success or the extent of their exposure. This is precisely what happened in our case, and constituted the principal barrier to settlement. Neither party had any reliable basis to predict, beyond his own intuitive judgment, what the final award would bring. Fortunately for our client, ours turned out to be the better guess, though there were some sleepless nights right to the end, not unlike the gut-wrenching wait for a jury to return.

A number of provisions and suggestions in the CPR Rules and Commentary can, if followed, help the parties to achieve more realistic and earlier estimates of their chances or exposure in the case. These include early rulings on key issues of law,³⁰ early identification and narrowing of issues (Rule 9.4(b)), bifurcation of issues (Rule 9.4(a)) and interim and partial "awards" (Rule 13.1).

Rule 11.3, authorizing the arbitrators to require parties to produce evidence in addition to that initially offered, can also provide effective and valuable inroads to unfounded optimism of either or both parties. Requests that a party submit more or different factual or legal support for theories or claims, sends a strong signal that a significant portion of a litigant's case is in trouble.³¹ This device, if it is fair to call it that, was used only once in

28. (...continued)
at 715. See also Resnik, *supra* note 13, at 426-31, in which Professor Resnik argues that participation by judges in supervising cases can lead to predispositions that are no less objectionable than prior involvement with the parties or a financial interest; both of which are grounds for disqualification. However, the contrary view is that fact-finding left to lawyers in the adversary system does not necessarily lead to the truth and that fact-finding by a neutral but not passive judge is superior. See Langbein, *supra* note 13, at 841-48. Professor Langbein advocates the German system which combines neutral but active fact-gathering by the judge with full adversarial activity in the realm of identifying legal issues and in legal analysis.

29. In reply to this article, Mr. Gorske strongly supports a passive role for arbitrators, and the importance of the appearance of neutrality. See, e.g., *Gorske's Reply*, *supra* note 23, at 80-81. This ideological expression explains (and confirms the accuracy of) our quarrel with the panel's failure to exercise more control over the proceedings. As we argue, the panel's adherence to this hallmark of the adversarial system of justice prolonged the proceedings and underscores, in our mind, the importance of CPR Rule 9 in furthering the time and cost-saving objectives of arbitration in the big case.

30. See ARBITRATION OF BUSINESS DISPUTES, *supra* note 8, Commentary, Rule 9 at 12.

31. Judges, even in criminal cases, have a right to suggest that a party has failed to sustain its burden of proof on a particular issue. 3 WEINSTEIN'S EVIDENCE, *supra* note 24, at ¶ 614[02] text & n.18 (quoting *United States v. Ramos*, 291 F. Supp. 71 (at conference in chambers, court suggested that government had introduced insufficient evidence on one issue; government then
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the early days of the hearings (and then, either ignored or misunderstood by our opponent). After all the evidence was in, however, the panel assertively requested the parties to calculate damages in a different way, and to support certain legal theories with additional authority. By then, unfortunately, it was too late; with the award then only weeks away, no major reassessment of the parties' own judgment on the outcome proved possible. Rule 11.3 is, of course, antithetical to the adversary process, and therein lies its value if arbitration is to at least pull even with court litigation in the fostering of settlement.³²

Finally, our arbitrators presaged the promulgation of CPR Rule 13.2 by rendering an award that stated fully the reasoning upon which it rested. The CPR Commentary well articulates the soundness of this rule in noting, that requiring arbitrators to spell out their reasoning is "good discipline for arbitrators," it requires them to give "second thoughts" to the soundness of their decision, and should restrain "any tendency on the part of arbitrators to reach compromise awards," *i.e.*, to "split the baby."³³ We would add that a fully explained award may, in fact, diminish the likelihood that it will be overturned by a reviewing court, given the widely-accepted standard that arbitrators need not correctly apply the law, as long as it has not been manifestly disregarded.³⁴ In our case, the award acknowledged the panel's

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requested, and was given, leave to reopen; held not prejudicial. The trial judge's function was not merely that of an umpire, but to bring forth all relevant facts. Suggestions made by trial judges to prosecutors concerning elements of proof and appropriate lines of inquiry have often been held proper even when made in the presence of the jury), *aff'd*, 413 F.2d 743 (1st Cir. 1969).

32. Rule 11.3 allows the arbitration panel, in its discretion, to copy some of the aspects of the approach mandated in German civil procedure in which the judge has the primary responsibility for developing and investigating the facts and in selecting and questioning expert witnesses. Langbein, *supra* note 13, at 825.

33. ARBITRATION OF BUSINESS DISPUTES, *supra* note 8, Commentary, Rule 13 at 14.

34. *Northrop Corp. v. Triad Int'l Mktg. S.A.*, 811 F.2d 1265 (9th Cir. 1987); *Merrill Lynch, Pierce, Fenner & Smith v. Bobker*, 808 F.2d 930, 933 (2d Cir. 1986) ("[T]he term 'disregard' implies that the arbitrator appreciates the existence of a clearly governing legal principle but decides to ignore or pay no attention to it.") The courts have adopted this stringent standard for reversal because otherwise, it would "undermine [the courts'] well-established deference to arbitration as a favored method of settling disputes when agreed to by the parties." *Id.* Cf. *Shearson/American Express v. McMahon*, 482 U.S. 220 (1987) (Court reaffirms its reluctance to overturn arbitration awards).

In addition to "manifest disregard" of the law, additional grounds for vacating an award are available pursuant to the United States Arbitration Act, 9 U.S.C. § 10 which reads in part:

- (a) Where the award was procured by corruption, fraud, or undue means.
- (b) Where there was evident partiality or corruption of the arbitrators, or either of them.
- (c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the

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awareness of critical legal doctrines, even if it could have been argued on appeal (which it was not) that they were not correctly applied.

V. DISCOVERY PROCEDURES

Both the panel and the authors agree that discovery worked less efficiently and effectively than anticipated. There is a difference in view, however, as to why that happened.

As Mr. Gorske states, from the outset "the board determined that it would be liberal in directing discovery."³⁵ Under this approach (which sent an open invitation to counsel to crank up the discovery machine), broad, full-scale Federal Rules of Civil Procedure discovery was permitted during breaks between hearing weeks, upon a showing of even marginal relevance. Such broad-based discovery was disruptive to expeditious hearings and, at times, consumed the panel's and the parties' time on insignificant and/or irrelevant issues. Unfortunately, discovery was used to frame the issues,³⁶ rather than the far more appropriate converse.³⁷

34. (...continued)

controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

35. Gorske, *supra* note 1, at 384.

36. While Mr. Gorske disagrees with this observation, *Gorske's Reply, supra* note 23 at 79, our point is proven by his simultaneous acknowledgement that, "The principal issues resolved in the award were almost precisely the issues set out by the parties two and one-half years earlier in the preliminary statements they filed with the arbitrators." However, the initial and adversarial statement of the issues set forth by the parties, *were never narrowed* thereafter by discovery or ruling by the arbitrators, but were in fact sustained and augmented principally because full discovery was allowed on each of them and their sub-issues. That the issues were well-defined *before* discovery, according to each party's view of its own case, also supports our contention that neither party really needed massive discovery and that almost all of it was cumulative. Had some of those issues, identified at the outset, been decided, eliminated or narrowed early in the arbitration, the need for further discovery on those issues would not have been necessary, or could at least have been limited, and the proceedings thus simplified. Moreover, the influence of the discovery on the evidence presented often manifested itself in the form of both sides fighting to maintain the balance in the amount of evidence in the record. Little wonder then, as Mr. Gorske acknowledges at page 79, that numerous discovery documents were entered as exhibits. We would argue that this in no way supports the "fairness" or "appropriateness" of the far-reaching discovery permitted in our proceedings.

37. The Federal Rules of Evidence specifically allow broad discovery as is indicated in the Notes of the Advisory Committee to the 1946 Amendments to Rule 26 in which the Committee cites language that, "... the Rules ... permit 'fishing' for evidence as they should." Olson Transp. Co. v. Socony-Vacuum Co., 8 Fed. R. Serv. 34.41 (Callaghan 1944).

Unfortunately, in practice, discovery is often both overused, as a means to flood an opponent with burdensome requests in an effort to force settlement, and misused, as in the case of avoiding
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We believe the panel's liberal approach to discovery, in a case in which both parties had a wealth of information available in their own files, and had equal resources and sophistication, was a serious mistake. As too frequently happens in the big case in court, liberal discovery created the single largest obstacle to expeditious and efficient resolution of the dispute.³⁸ Had the panel been less permissive, and had they exerted the broad powers and control that the arbitration process grants them, the proceedings would have ended far sooner, but with, we suggest, the same result. An arbitration panel must not leave discovery to the parties, but should affirmatively and closely control it.³⁹ In order to do this, the panel must narrow the issues of the case early on, and permit discovery *only* on these defined issues, and only when a party can show palpable need.⁴⁰

37. (...continued)

the disclosure of information that is the subject of a valid discovery request. Wolfson, *supra* note 10, at 42. Recent amendments to the discovery rules have been in the direction of requiring increased judicial supervision to control discovery abuses. See FED. R. CIV. P. 26 advisory committee's note.

Brazil has pointed out in his study of discovery, Brazil, *Improving Judicial Controls over the Pre-trial Development of Civil Actions: Model Rules for Case Management and Sanctions*, 1981 AM. B. FOUND. RES. J. 873, 905, that failure to narrow contested issues prior to beginning discovery significantly reduces the efficiency of pre-trial preparation. Brazil notes criticism of the approach taken in the MANUAL FOR COMPLEX LITIGATION, *supra* note 6, which does not encourage judges to attempt to define issues early in the process, but instead allows an initial "wave" of discovery the purpose of which is to identify the sources of discoverable information. Only after this initial, and usually huge, wave of discovery are the issues narrowed.

38. See Brazil, *Civil Discovery: Lawyers' Views of Its Effectiveness, Its Principal Problems and Abuses*, 1980 AM. B. FOUND. RES. J. 787, 827 (Brazil's research indicates that lawyers who primarily handle big cases were very dissatisfied with discovery practice and a large part of that dissatisfaction was a result of the delay attributable to discovery).

39. Brazil concludes in his study, *supra* note 37, at 884, that discovery in an adversary system is in "desperate need of external control." Control of discovery by the parties has not, and given the adversary system, cannot work.

40. There is an internal inconsistency between the CPR Rules and the commentary on discovery that demands correction. While CPR Rule 10 requires the arbitrators to permit and facilitate discovery, the commentary sends a different message:

Arbitration is not for the litigator who will "leave no stone unturned." Unlimited discovery is incompatible with the goals of efficiency and economy. The Federal Rules of Civil Procedure are not applicable. *Discovery should be limited to that for which a party has a substantial, demonstrable need.*

ARBITRATION OF BUSINESS DISPUTES, *supra* note 8, Commentary at 12 (emphasis added).

The approach of the Commentary is far superior to that of the Rule itself, which should be subordinated or amended to reflect this.

Attempts to narrow the scope of discovery from all "relevant" material to something more akin to "need" under the Federal Rules have not been successful. Wolfson, *supra* note 10, at 47 (continued...)

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Finally, procedures adopted in the final stages of the proceedings, such as deferral of cross-examination until whole sections of testimony had been presented, and depositions of scheduled witnesses (especially experts) immediately prior to their appearance, should have been implemented at the outset and would have reduced cross-examination time enormously.⁴¹

VI. CONCLUSION

Given the complexity and scope of the case, the fact that the dispute was not processed any more expeditiously in arbitration than it would have been in court, was no surprise. That it fared *as well*, was a surprise, given the fact that procedures for arbitrating the big case had yet to be adequately designed, and the fact that the panel initially took their places as "neutral and passive" fact-finders. It is naive to believe that "competent, even extraordinary counsel," each representing clients with large sums of money, or rights at stake, will agree *after* the dispute has arisen, upon rules that will materially expedite the proceedings or render them less burdensome.⁴² This

40. (...continued)

n.190. However, it should be noted that discovery reform under the Federal Rules of Civil Procedure has revolved around increased judicial supervision of discovery. Failure of arbitrators to closely supervise discovery may eliminate any advantages arbitration has over litigation. Mr. Gorske states in his reply that "discovery in the case was closely supervised by the arbitrators" and that "*fairness* required much . . . of the discovery in the case." *Gorske's Reply*, *supra* note 23 at 78 (emphasis supplied). This misses the point, we suggest; the far more precise standards of "control" and "substantial demonstrable need" should be the guideposts.

41. See ARBITRATION OF BUSINESS DISPUTES, *supra* note 8, at Rule 9.4(a).

42. This phenomenon has been previously described. Professor Arthur R. Miller writes:

Unfortunately, however, the ideal of a smooth pretrial process engineered and controlled by the attorneys has not been realized, especially in complex and difficult cases. The vision that adversarial tigers would behave like accommodating pussycats throughout the discovery period, saving their combative energies for trial, has not materialized. Given the realities of modern large-scale litigation, the rulemakers' expectations for a self-executing cooperative pretrial phase have proven to be somewhat naive.

Miller, *supra* note 13, at 15. In the specific context of pre-trial discovery see also Wolfson, *supra* note 10, at 49-51 ("The process can only work effectively if the pretrial disclosure of information is substantially nonadversarial, yet the ethical, professional, and societal framework in which lawyers function is highly client-oriented . . . with little or no incentive to aid the opposing side or the legal system itself.") Wolfson goes on to suggest that the lawyers failure to act in a sufficiently adversarial manner might reasonably be considered a breach of the ethical code which requires a lawyer to "represent his client zealously within the bounds of the law." *Id.* at 49-50. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-1 (1980).

A study conducted for the American Bar Association, reported in three parts, bears out the fact that lawyers do not cooperate in the discovery process, especially in big cases, but rather treat discovery as just another part of the adversarial process. Brazil, *supra* note 38, at 810 ("In the adversarial system it's one group's job to get information and the other's not to give it to (continued...)")

is particularly true if agreement is sought on rules that in any way disrupt the balance of tactical, factual and legal advantages each party perceives it owns at the outset. An adversarial system of justice does not work that way; if adversaries in a hotly contested dispute could agree between themselves, in advance of hearing or trial, upon the important rules of the contest, they could very likely settle the case. To test the validity of this proposition, one needs only to imagine what complex federal court litigation would be like, deprived of the imposition of the Manual for Complex Litigation or the Federal Rules of Civil Procedure, not to mention Rule 11.⁴³

Arbitration, at its best, is a counterpart, not an adjunct, to the adversarial system of justice revered by some, though by no means all, of the republic's lawyers, jurists and legislators. It is for this reason that arbitration has traditionally eschewed formal rules of evidence, procedure and other legalisms, going so far as to permit arbitrators, as well as parties, to sit without benefit of legal education or license to practice! In disputes that involve neither huge sums of money, nor enterprise-threatening claims, nor numerous and vastly complicated issues of fact and law, it works very well. When some or all of those factors are present in a dispute, however, the informalities of arbitration may serve to defeat the very objectives of expeditious and efficient resolution of disputes which the system was designed to achieve.

The new CPR Rules, however, point the way toward solving the dilemma of accommodating the arbitration process to the large, complex case, without rendering arbitration just another, not necessarily better, way to resolve this type of dispute. The key is the grant in CPR Rule 9 to, and utilization by, arbitrators of more, not less, control over the conduct of the proceedings, and control that can withstand attack on appeal.⁴⁴ Only toward the end of the big

42. (...continued)

them."); Brazil, *supra* note 37, at 882 ("[T]he assumption that the discovery system would be efficient and effective in big cases, while remaining substantially self-executing and self-policing, was misplaced."); Brazil, *Views from the Front Lines: Observations by Chicago Lawyers About the System of Civil Discovery*, 1980 AM. B. FOUND. RES. J. 217. But see Gorske's Reply, *supra* note 23, at 79.

43. The contribution made by FED. R. CIV. P. 11 to efficient and fairly dispensed justice is not without debate. As with the Loch Ness Monster, Rule 11's salutary effects have been more often discussed than actually observed. For a general overview of Rule 11 and its effects, see Shaffer, *Rule 11: Bright Light, Dim Future*, in SANCTIONS: RULE 11 AND OTHER POWERS 1 (C. Shaffer & P. Sandler, 2d ed. 1988). Substantial criticism has been directed at Rule 11's practical application, including charges that Rule 11 is unpredictable and incoherent in its application and that too vigorous enforcement of the Rule may deny due process rights. See 5A WRIGHT & MILLER, *FEDERAL PRACTICE AND PROCEDURE: CIVIL 2d* § 1332 (1990); Note, *Plausible Pleadings: Developing Standards For Rule 11 Sanctions*, 100 HARV. L. REV. 630 (1987).

44. If rules such as the ones promulgated by the AAA or CPR are adopted by reference in the contractual arbitration clause itself, they become fully enforceable. See, e.g., *Commonwealth Edison Co. v. Gulf Oil Corp.*, 541 F.2d 1263, 1273 (7th Cir. 1976). Even if such rules are not
(continued...)

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case, chaired by Mr. Gorske, was such control imposed unilaterally and, as it turned out, without objection or appeal. Had that control been exercised earlier, we would have been able to concur wholeheartedly that this big case was more efficiently and expeditiously resolved than it would have been in court. Maybe, next time.

44. (...continued)

adopted by the arbitration clause, parties could reasonably and correctly agree to be bound by some or all of them at the outset of the proceedings, a difficult though not impossible endeavor.

